



City of
Waukegan

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Richard H. Hyde, Mayor
Wayne Motley, City Clerk
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January 26, 2009

VIA E-MAIL TRANSMISSION AND FEDERAL EXPRESS

Richard C. Karl
Director, Superfund Division
United States Environmental Protection Agency
Region 5
S-6J
77 West Jackson Boulevard
Chicago, IL 60604

**Re: City of Waukegan's Second Request for Extension of Public Comment
Period
Waukegan Harbor – Outboard Marine Corporation Superfund Site**

Dear Mr. Karl:

I am in receipt of your letter of January 23 (enclosed), rejecting the City's request for a further extension of the public comment period on USEPA's impending Record of Decision relating to residual PCB contamination in Waukegan Harbor. The subject request, including subsequent correspondence, is also enclosed. I also enclose a Resolution passed by the Waukegan City Council on January 20, 2008 asking the Obama administration to "extend the public comment period and engage in a dialogue with the City concerning the Master Plan and the remedial plan for Waukegan Harbor."

I regret your decision to rebuff the City's request for a dialogue concerning the harbor and the future of the City's lakefront. In effect, your letter states such a dialogue is both unnecessary and would be unproductive. Evidently, it is your view that anything USEPA and the City had to say to one another concerning the harbor was said during our previous (unsuccessful) effort to reach agreement on a dredging project that would have been funded, in part, under the Great Lakes Legacy Act ("GLLA"). I strongly disagree with any perspective that discounts the possibility of achieving consensus through a dialogue that is long overdue.

As you know, this issue of "what to do about the harbor" was referred to the Superfund program. The Agency made the referral after rejecting conditions requested by the City Council in order to proceed with a GLLA dredging project. You will recall that the stumbling block in reaching an agreement was how to clean up the harbor in a manner that advanced the City's Downtown and Lakefront Master Plan ("Master Plan"). The position of the Agency under the prior administration was stated succinctly in an August 22, 2007 press release. As far as the Agency was concerned, realization of the goals enunciated by the City Council in the Master Plan was irrelevant and "unrelated to the cleanup of the harbor." While the Agency may have had limited authority under the GLLA to consider the goals of the Master Plan, once referral occurred, as addressed in our prior

correspondence on this issue, an entirely new set of regulatory and procedural requirements came into play under the Superfund Statute.

The authority granted to the President under the Superfund Statute to develop a cleanup plan for the harbor is far more expansive than under the GLLA. The Agency previously dismissed as irrelevant the City Council's concern that the proposed dredging plan was inconsistent with the Master Plan. The Superfund Statute, in contrast to the GLLA, requires that the goals of the Master Plan be taken into consideration by the Agency when selecting a remedial plan for the harbor. I offer only a few examples of how the decision-making process under the Superfund Statute differs from that under the GLLA:

- In selecting a remedial alternative for the harbor, the Agency is required to make a determination concerning the "reasonably anticipated future use" of the harbor area. The Agency may not disregard the future use of the harbor and land surrounding it as designated in the Master Plan and other ordinances regulating the use of this land that have been adopted by the City Council (or are in the final stages of being adopted). The Agency may not ignore the fact that the City Council has determined that the harbor will be used for recreational boating, not industrial shipping. In deciding whether to spend \$35 million to dredge the harbor for the benefit of industrial shipping, the Agency may not ignore the Master Plan. The Superfund Statute requires that the Agency acknowledge that spending \$9.6 million on a remedial cap, in addition to saving \$25.4 million, promotes the goals of the Master Plan – a harbor for recreational boating and the mixed use (post-industrial) redevelopment of the harbor area.
- The Superfund Statute expressly states that the President is not required to obtain federal, state or local permits when performing a cleanup. The practical effect of the referral to the Superfund program is that the Agency is not required to obtain a permit from United States Army Corps of Engineers prior to placing a remedial cap within the navigational channel of the harbor. The prior administration misrepresented to the public that the Agency had "no choice", that it was legally "required" to dredge the harbor. These statements, offered to justify a \$35 million dredging plan which the Agency concedes is no more protective of human health and the environment than the \$9.6 million capping plan, are simply not true. Moreover, despite our repeated requests, the former administration failed to provide any legal analysis supporting its constrained reading of the Agency's authority under the Superfund Statute.
- Unlike the GLLA, the Superfund Statute directs the President to "make reasonable efforts to identify and notify potentially responsible parties as early as possible before selection of a response action." We remind you again in this regard that the City has obtained a determination that the Agency should have been seeking – that the harbor industries are potentially responsible parties in connection with the remediation of the OMC Superfund Site. The City took a significant step toward that determination as a result of the November 24, 2008 decision by Judge Kennelly of the U.S. District for the Northern District of Illinois. Yet you have still taken no action against these companies.

Given the stark contrast between the President's authority under the GLLA and the Superfund Statute, I am perplexed by your refusal to extend the public comment period and to engage in the dialogue requested by the City Council. I am concerned that you are laboring under the impression

that a decision once made to dredge the harbor under the GLLA must be implemented under the Superfund Statute. This I fear explains why meetings occurred throughout the summer of 2008 with those who appear to be more in line with the views of Region 5, including what you refer to as "harbor industry". It is unfortunate that the former administration did not make a single phone call to me or my staff to discuss how we might work together to clean up the harbor in a manner that advances the goals of the Master Plan.

Region 5 has elected to circumvent, or completely ignore, several regulatory and procedural requirements of the Superfund Statute, and to rely on unsupported conclusions. By of example, the Agency finds that spending \$35 million on a dredging plan that will maintain the industrial character of the lakefront will confer "important redevelopment benefits" on the City. The Agency makes this finding without consultation with me or my staff and in complete disregard of the Master Plan – a plan adopted by the City Council after extensive public hearings (in which the voice of "harbor industry" was heard) and after the City Council sought out the advice of the nation's leading experts on smart growth and urban renewal strategies. The Agency substitutes its judgment for that of the City Council, and does so without offering any evidence to support its view of what is best for the City's economic future.

The Agency has clearly pre-determined to implement a remedy selected under the GLLA that is wholly inconsistent with applicable requirements of the Superfund Statute. The request for public comment and refusal to make full disclosure of the administrative record (or to at least acknowledge that critical analysis was not done, or done poorly) appears to be nothing more than a charade -- the final step in a process begun and dictated by the prior administration to dredge the harbor. In refusing to extend the public comment period and engage in dialogue, you have elected to continue a process and decision begun by the prior administration of USEPA, or at least Region 5. We note in this regard that your actions are completely contrary to the recent policy directive (enclosed) issued by Administrator-designate Lisa P. Jackson. In particular, your actions to date are inconsistent with the following precepts enunciated by Ms. Jackson:

1. When scientific judgments are suppressed, misrepresented or distorted by political agendas, Americans can lose faith in their government to provide strong public health and environmental protection.
2. Policy decisions should not be disguised as scientific findings. I pledge that I will not compromise the integrity of EPA's experts in order to advance a preference for a particular regulatory outcome.
3. EPA needs to exercise policy discretion in good faith and in keeping with the directives of Congress and the courts. When Congress has been explicit, EPA cannot misinterpret or ignore the language Congress has used. When a court has determined EPA's responsibilities under our governing statutes, EPA cannot turn a blind eye to the court's decision or procrastinate in complying.
4. EPA's actions must be transparent. *** Public trust in the Agency demands that we reach out to all stakeholders fairly and impartially, that we consider the views and data presented carefully and objectively, and that we fully disclose the information that forms the bases for our decisions. I pledge that we will carry out the work of the Agency in public view so that the door is open to all interested parties and that there is no doubt why we are acting and how we arrived at our decisions.

5. We must take special pains to connect with those who have been historically underrepresented in EPA decision making, including the disenfranchised in our cities and rural areas, communities of color, native Americans, people disproportionately impacted by pollution, and small businesses, cities and towns working to meet their environmental responsibilities. Like all Americans, they deserve an EPA with an open mind, a big heart and a willingness to listen.

More to the current point, your current actions are in direct contravention of the express directive issued by the Obama administration on January 20. In a memorandum issued by Chief of Staff Emanuel (enclosed), the President directed all agencies of the Executive Branch (this includes USEPA) to immediately suspend all regulatory and rulemaking activities pending review and approval by the agency heads appointed by the President.¹ The directive also suggests 30-day extensions of public comment periods in order to accommodate this review and approval process. Your decision to rebuff the City Council's request for consultation and a dialogue is in direct contravention of the President's directive.

The City seeks to avoid an escalation of this matter. Therefore, under all of these circumstances, including those addressed in our prior correspondence, we request that you withdraw your January 23 rejection and grant the City's request for an extension of the public comment period in this matter. Further, I request a meeting with Administrator-designate Jackson at her earliest convenience to begin the dialogue requested by the City Council on how the City and USEPA will work together to achieve our common objectives.

Very truly yours,



Richard Hyde
Mayor

Enclosures

¹ I have been provided with your January 26 e-mail to Ray Vukovich, in which you take the position that President Obama's directive does not apply to this situation because "the issuance of the Region's proposed plan, or the issuance of a Record of Decision (ROD), does not constitute the issuance of a rule or regulation." I am advised by our attorneys that you are not correct. The issuance of a ROD is in fact a rulemaking. See *Neighborhood Toxic Cleanup Emergency v. Reilly*, 716 F. Supp. 828, 836 (D.N.J. 1989) As to general public, a ROD is a rule. This is consistent with §113(j) of the Superfund Statute, 42 U.S.C. 9613(j)(1) ("In any judicial action under this chapter, judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be limited to the administrative record.") In this context, it appears that your failure to acknowledge established precedent and the statute under which USEPA operates is yet another example of your effort to foster a predetermined result. Equally disturbing, your e-mail reflects what can only be characterized as an insubordinate refusal to abide by a Presidential directive.

cc: Waukegan City Council
Ray Vukovich, Director of Governmental Services
Senator Richard Durbin
Senator Roland Burris
Congresswoman Melissa L. Bean, Eight District of Illinois
Congressman Mark Steven Kirk, Tenth District of Illinois
State Senator Terry Link
Rahm Emanuel, Chief of Staff
Lisa P. Jackson, Administrator-designate
Brian Grach, Corporation Counsel
Jeffery D. Jeep, Special Environmental Counsel
Michael S. Blazer, Special Environmental Counsel

Letter to Richard C. Karl
January 26, 2009
List of Enclosures

DATE	DOCUMENT	No.
December 2, 2008	CITY Request for extension of pubic comment (w/o attachments)	1
January 2, 2009	CITY request of extension of public comment to 3/4/09 (in light of delayed response to City's FOIA requests)(without attachments)	2
January 20, 2009	A Resolution Respecting The Cleanup Plan For Waukegan Harbor Proposed By USEPA	3
January 20, 2009	Memorandum Issued by Chief of Staff	4
January 22, 2009	City requests response on whether public comment period will be extended until 3/4/09 (without attachments)	5
January 23, 2009	Memorandum by USEPA Administrator on Transparency	6
January 23, 2009	Letter from USEPA denying request to extend public comment period	7
January 26, 2009	Response by USEPA concerning Memorandum by Chief of Staff	8

ENCLOSURE 1

Jeep & Blazer, L.L.C.
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Via Electronic Mail (adler.kevin@epa.gov)

December 2, 2008

Kevin Adler
Project Manager
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77 West Jackson Boulevard
Mail Code: SR-6J
Chicago, IL 60604-3507

**Re: Proposed Remedial Action Plan For Waukegan Harbor PCB
Contaminated Sediments
Request for Extension of Public Comment Period Until
February 11, 2009**

Dear Mr. Adler:

As you know, we serve as special environmental counsel for the City of Waukegan ("City"). This letter is in follow-up to the request we made at the November 13, 2008 public meeting that the public comment period on the proposed remedial action be extended until February 11, 2009. We request a timely written response to this request.

USEPA's preferred remedial alternative, dredging, is estimated to cost \$34.9 million. USEPA estimates that it would cost \$9.6 million to cap the PCB harbor sediments. According to USEPA, both alternatives protect human health and the environment. USEPA offers two reasons for spending an additional \$25 million to dredge the harbor. First, USEPA would "likely" be legally prevented from capping PCB contaminated sediments because Waukegan Harbor is a federally-authorized channel. Please refer to USEPA Fact Sheet, "EPA Proposes Cleanup Plan for Harbor Pollution" (hereafter "Fact Sheet"), Page 6, Second column, Second paragraph, enclosed as

Attachment 1. The second stated reason is that dredging the harbor “could” have “important redevelopment benefits”. Please refer to Fact Sheet, Page 6, Second column, Third paragraph.

You also made two comments at the November 13, 2008 public meeting relating to USEPA's preference for dredging over capping the sediments. First, you stated that the National Oceanic and Atmospheric Administration (NOAA) is an advocate for dredging. NOAA believes the economic benefit of dredging justifies spending an additional \$25 million. Second, you stated that there is a “debate” among lawyers within USEPA over whether CERCLA “trumps” the Rivers and Harbors Act. Evidently, some USEPA attorneys do not think USEPA is legally prevented from capping PCB contaminated sediments because Waukegan Harbor is a federally-authorized channel. Perhaps, some USEPA lawyers view the CERCLA requirement for “cost effective” remedies as taking precedent over the Rivers and Harbors Act.

In sum, USEPA's preferred dredging alternative is based on economic and legal rationales that remain uncertain and undefined even within USEPA. The City is unable to provide meaningful comment without understanding the economic and legal analysis underpinning USEPA's selection of dredging over capping the Harbor.

On August 8, 2008, when the City first learned that USEPA may be selecting a remedy for the Harbor, we submitted a Freedom of Information Act (FOIA) Request to USEPA (enclosed as **Attachment 2**). The request seeks:

All documents of any kind, including, but not limited to, any and all communications, meeting notes, meeting minutes, meeting sign-in sheets, plans, proposals, drawings, and studies, from July 1, 2007 to the present, relating to or reflecting any planned or proposed removal or remedial action pursuant to the federal Superfund program, 42 U.S.C. 9601, et seq., in connection with Waukegan Harbor, including, but not limited to, any and all documents relating to or reflecting communications regarding such an action with the Waukegan Port District, National Gypsum Co., Bombardier Motor Corporation of America, LaFarge North America, Inc., LaFarge Building Materials, Inc., St. Marys Cement, Inc., and the office of Congressman Mark Kirk, or anyone acting or purporting to act on their behalf.

We await a response to our August 8 request.

Following the public hearing, on November 14, 2008, we submitted additional FOIA requests to both USEPA and NOAA (enclosed as **Attachment 3**). These requests seek:

Any and all documents, including but not limited to, all legal analysis, legal and nonlegal memoranda, legal research, and all inter-agency and third party written and electronic correspondence regarding Mr. Adler's statement at the November 13, 2008 Waukegan Harbor clean up plan public hearing in which he asserted that

NOAA takes the position that Congressional authorization for depths in navigable waterways must be maintained.

We await a response to our November 14 requests.

As we explained at the November 13 public meeting, the National Contingency Plan requires that USEPA,

[p]rovide a reasonable opportunity, not less than 30 calendar days, for submission of written and oral comments on the proposed plan and the supporting analysis and information located in the information repository, including the RI/FS. 40 CFR 300.430(f)(3)(i)(C)(emphasis added)

The City has not been provided with an explanation of the legal and economic rationales underpinning USEPA's preference for dredging over capping. It appears, based on your comments at the November 13 public meeting, that USEPA has yet to fully articulate its legal and economic rationale for dredging over capping the Harbor. In any event, the City is being denied a reasonable opportunity to participate in the decision-making process by not being provided a complete description of USEPA's economic and legal analysis of the dredging and capping alternatives.

We enclose as **Attachment 4** an email from USEPA dated November 19, 2008, committing to greater involvement by local governments in USEPA's decision-making process. This commitment reaffirms the Executive Order on Federalism issued by President Clinton on August 4, 1999, enclosed as **Attachment 5**. President Clinton's Executive Order on Federalism states, in relevant part:

When an agency foresees the possibility of a conflict between State law and Federally protected interests within its area of regulatory responsibility, the agency shall consult, to the extent practicable, with appropriate State and local officials in an effort to avoid such a conflict.

* * *

When an agency foresees the possibility of a conflict between State law and Federally protected interests within its area of regulatory responsibility, the agency shall consult, to the extent practicable, with appropriate State and local officials in an effort to avoid such a conflict. Executive Order on Federalism, §§ 4(d) and 6(a).

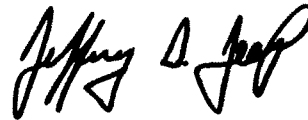
USEPA has long known that the City of Waukegan does not share the view that dredging the harbor will have "important redevelopment benefits" for the City¹. USEPA is well aware that the

¹ We refer you, for example, to (1) the May 7, 2007 City Council Resolution with respect to Waukegan Harbor (City will move forward with Harbor dredging project on the condition Federal legislation is enacted regarding the depth of the Harbor); (2) on July 26, 2007 the City transmitted a Project Agreement for the

City views the dredging alternative as conflicting with the City's Downtown and Lakefront Master Plan. The Executive Order on Federalism directs USEPA to "consult" with the City to avoid such a conflict. No consultation has taken place (although, USEPA has deemed it appropriate to consult with the Harbor industry that would benefit from the dredging alternative²).

We respectfully request that USEPA extend the public comment period until February 11, 2009³ to afford the City a reasonable opportunity to comment on USEPA's preferred remedial alternative (as mandated by the NCP) and to allow for meaningful consultation between USEPA and the City (as mandated by the Executive Order on Federalism).

Very truly yours,

A handwritten signature in black ink, appearing to read "Jeffery D. Jeep". The signature is stylized with a large, looped "J" and a cursive "D".

Jeffery D. Jeep

cc: Mike Joyce (USEPA)
Ray Vukovich (City of Waukegan)

JDJ/me

Harbor dredging containing "conditions precedent", including a condition concerning enactment of Federal legislation, that USEPA found unacceptable; and (3) the City's Position Paper on Waukegan Harbor (posted on the City's Web Site at <http://www.waukeganweb.net> since September 2007).

² As noted in our remarks at the public meeting, we were informed by legal counsel for Harbor industry that such meetings have taken place with USEPA.

³ We reserve the right to request a further extension of the public comment period if USEPA and NOAA do not respond to our August 8 and November 14 FOIA requests in a timely manner.

ENCLOSURE 2

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Via Electronic Mail (adler.kevin@epa.gov)

January 2, 2009

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Chicago, IL 60604-3507

**Re: Proposed Remedial Action Plan For Waukegan Harbor PCB
Contaminated Sediments
Request for Extension of Public Comment Period Until
February 11, 2009**

Dear Mr. Adler:

This follows our letter of December 2, 2008 in which we requested that the public comment period on the proposed remedial action for Waukegan Harbor be extended until February 11, 2009. On December 3, 2008 we were advised by you that the public comment period had been extended until February 4, 2009. We stated in our December 2 letter (footnote 3) that we "reserve the right to request a further extension of the public comment period if USEPA and NOAA do not respond to our August 8 and November 14 [Freedom of Information Act] requests in a timely manner." USEPA and NOAA have not fully responded to our August 8 and November 14 Requests. Further, the City is informed that USEPA will not respond to the August 8 and November 14 Requests until January 25, 2009. The City therefore requests that the public comment period be extended until March

4, 2009 to afford the City a meaningful opportunity to participate in the remedy selection process for Waukegan Harbor. It is unrealistic and fundamentally unfair for USEPA to expect City staff to review documents received on January 25, 2009, confer with the City Council and submit comments to USEPA by February 4, 2009. We request a timely written response to this request.

On December 12, 2008, in response to a FOIA request¹ by the City, NOAA transmitted a three page memorandum dated May 16, 2008 prepared by Todd Goeks. The following statement appears at page 3 of the May 16 Memorandum:

Capping hazardous substance contaminated sediments within the federal navigation channel at a depth less than [its authorized depth] would require EPA to seek re-authorization of the federal channel by Congress to the desired depth prior to constructing the remedy. Without reauthorization of the channel depths, placement of a cap within the federal navigation channel at an elevation above the full authorized depth is not an implementable option.

NOAA has not provided the City with any legal analysis to support its position that USEPA does not have authority under CERCLA to select the capping alternative for Waukegan Harbor.

USEPA partially responded to the City's August 8 and November 14 Requests on December 3, 2008² and December 15, 2008³. On December 16, 2008 the City was informed that USEPA will not respond to the City's August 8 and November 14 Requests until January 25, 2009. Please refer to our December 16, 2008 email to USEPA enclosed as **Attachment 1**.

To date, NOAA and USEPA have not provided any documents to the City supporting

¹ The City's November 14, 2008 FOIA request to NOAA requested: "Any and all documents, including but not limited to, all legal analysis, legal and nonlegal memoranda, legal research, and all inter-agency and third party written and electronic correspondence regarding Mr. Adler's statement at the November 13, 2008 Waukegan Harbor clean up plan public hearing in which he asserted that NOAA takes the position that Congressional authorization for depths in navigable waterways much be maintained." (Emphasis Added)

² Your December 3, 2008 electronic mail provided the following documents as attachments: July 2006 Risk Assessment, April 2008 FS, May 16, 2008 Memorandum from NOAA, May 19, 2008 letter from the CAG, September 30, 2008 Response to Comments by the National Review Board, and October 2008 RIFS prepared by CH2M Hill, October 2008 ROD Summary and October 13, 2008 Corrected Risk Assessment prepared by CH2M Hill.

³ USEPA's December 15, 2008 FOIA response included the April 2008 RI Report, the October 2008 Feasibility Study and the October 13, 2008 Technical Memorandum.

the two purported rationales for the dredging alternative: (1) that USEPA is required by “legal necessity” to select the dredging alternative; and (2) the dredging alternative will have “important redevelopment benefits” for the City. Please refer to our December 2, 2008 letter (pp. 1 – 2).

By way of example, we offer three the categories of documents the City expects to receive in response to its August 8 and November 14 Requests:

- Documents relating to the reasonably anticipated future use of Waukegan Harbor;
- Documents relating to the purported “legal necessity” to select the dredging alternative; and
- Documents relating to the “community acceptance” of the dredging alternative.

1. Future Use

On June 4, 2001, Larry Reed, Acting Director of USEPA’s Office of Emergency and Remedial Response, issued a Memorandum on the subject of “Reuse Assessments: A Tool to Implement the Superfund Land Use Directive” (OSWER 9355.7-06P). The June 4, 2001 Memorandum affirmed a previous USEPA directive entitled, “Land Use in the CERCLA Remedy Selection Process,” OSWER Directive No. 9355.7-04, issued in May 1995 (the “Superfund Land Use Directive”). The Superfund Land Use Directive mandates that USEPA make a specific finding with respect to the reasonably anticipated future use of Waukegan Harbor. Such a finding must consider, for example, the Downtown – Lakefront Master Plan unanimously adopted by the Waukegan City Council in July 2003. USEPA is required to make a determination with respect to the reasonably anticipated future use of Waukegan Harbor in the RI/FS⁴. USEPA has followed this procedure when selecting remedial actions at other Operable Units at the OMC Site⁵. The RI/FS prepared by USEPA for Waukegan Harbor, an Operable Unit of the OMC Site, does not comply with the Superfund Land Use Directive. The RI/FS does not even reference the City’s Master Plan. How is USEPA to determine the reasonably anticipated future use of the submerged land in

⁴ Please refer to the Superfund Land Use Directive (“Documenting the Reuse Assessment”).

⁵ Please refer to Appendix 3-A, “Future Land Use Considerations”, in the Feasibility Study for Operable Unit 2 of the Waukegan Harbor Site (November 6, 1998).

Waukegan Harbor without considering the future use of the land surrounding the harbor?

2. Legal Necessity

With respect to the purported “legal necessity” to select the dredging alternative, the City assumes legal counsel at USEPA has undertaken an analysis of Section 121 of CERCLA, 42 U.S.C.A. §9621 and, specifically, §§ 121(b)(4)(F) and 121(e)(1), 42 U.S.C.A. §§ 9621(b)(4)(F) and 9621(e)(1). According to USEPA, the remedial action for Waukegan Harbor will be paid for by the Fund, not the PRPS⁶. Subsection (b)(4)(F) of Section 121 of CERCLA specifically authorizes the Administrator to waive compliance with any federal law when balancing competing demands on the Fund. Given the \$25,000,000 disparity between the dredging and capping alternatives, the City assumes the office of legal counsel has undertaken a thorough analysis of USEPA’s authority to waive compliance with Sections 403 or 404 of the Clean Water Act, 33 U.S.C.A. §§ 403 and 1334 (relating to the requirements for permits for the placement of fill or obstructions in navigable waters of the United States). Indeed, we assume this is the analysis to which you referred in describing the “debate” among lawyers within USEPA over whether CERCLA “trumps” other federal statutes. (Please refer to p. 2 of our December 2, 2008 letter.)

3. Community Acceptance

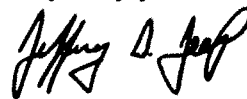
The City was surprised to learn that the federal Maritime Administration is the author of the letter submitted to USEPA by the Waukegan Harbor Citizen’s Advisory Group (CAG) on May 19, 2008 in support of the dredging alternative. As previously noted, on December 3, 2008, in partial response to the City’s November 14 and August 8 Requests, you transmitted the CAG’s May 19 letter via electronic mail (as an attached Word file named “May 19 2008.doc”). A review of the metadata within the Word file discloses the author of CAG’s May 19 letter to be “Floyd Miras” at the “Maritime Administration”. It is a cause of concern to the City that the Department of Commerce, NOAA or any other federal agency, may be using a “community organization” as a surrogate to advocate for the dredging alternative. It is important that the City receive a complete and timely response to its August 8 Request for “any and all communications” by, within or to USEPA concerning

⁶ A copy of Judge Kennelly’s November 24, 2008 is enclosed as **Attachment 2**.

selection of the harbor remedial alternative. It would be most unfortunate if the evidence cited by USEPA as "community acceptance" of the dredging alternative were merely USEPA, or some other federal agency(s), speaking through a "citizens group". The City, and no doubt the general public, would be interested to know why the federal Maritime Administration is drafting correspondence for the CAG to submit to USEPA.

USEPA and NOAA have not complied with the City's FOIA requests for documents relating to the purported rationale (economic benefit and legal necessity) for spending an additional \$25,000,000 on the dredging alternative. The City is unable to meaningfully participate in the process of submitting of public comment on the proposed remedial alternative. Further, USEPA has not engaged in the type of consultation with the City required by the Executive Order on Federalism (referenced in our December 2, 2008 letter) and the Superfund Land Use Directive. We therefore request that the public comment period be extended until at least March 4, 2009. Assuming NOAA and USEPA promptly comply with the City's August 8 and November 14 Requests, the additional time will afford the City the opportunity to submit meaningful public comment on USEPA's proposed remedial alternative for Waukegan Harbor. The additional time will also afford the City and USEPA, which will have a new Administrator on January 20, 2008 (or shortly thereafter), to engage in the type of meaningful consultation contemplated by the Executive Order on Federalism and Superfund Land Use Directive.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jeffery D. Jeep". The signature is stylized with a large, looped "J" and a cursive "D".

Jeffery D. Jeep

cc: Mike Joyce (USEPA)
Robert A. Kaplan (USEPA)
Ray Vukovich (City of Waukegan)

JDJ/me

ENCLOSURE 3

No. 09-R-8
A RESOLUTION RESPECTING THE CLEANUP PLAN FOR
WAUKEGAN HARBOR PROPOSED BY USEPA

WHEREAS, the City Council adopted four Resolutions in connection with remedial plans for Waukegan Harbor proposed either by the United States Army Corps of Engineers (ACOE) or the United States Environmental Protection Agency (USEPA) on:

- January 4, 2004 (authorizing negotiations with the ACOE);
- April 16, 2004 (rejecting disposal of the PCB contaminated sediments at the Yeoman Creek Landfill);
- May 7, 2007 (establishing conditions for participation in a dredging project); and
- August 6, 2007 (also establishing conditions for participation in a dredging project); and

WHEREAS, a Position Paper setting forth the City Council's position with respect to the harbor cleanup has been posted on the City's Web Site (<http://www.waukeganweb.net>) since September 2007; and

WHEREAS, the question is not whether the City Council desires to cooperate in the cleanup of the PCB contaminated sediments remaining after USEPA's 1992 cleanup effort, but rather ensuring that the next cleanup is –

- cost effective;
- protective of human health and the environment; and
- advances implementation of the City Council's "21st Century Vision for Waukegan's Downtown and Lakefront" (Master Plan); and

WHEREAS, in October 2008 the USEPA proposed remedial alternatives for the harbor sediments, including:

- a \$35 million plan to dredge the harbor (Dredging Alternative); and
- a \$9.6 million plan to encapsulate the PCB contaminated sediments by means of an engineered cap (Capping Alternative);

WHEREAS, USEPA acknowledges both remedial alternatives are equally protective of human health and the environment;

WHEREAS, USEPA nonetheless proposes to select the \$35 million Dredging Alternative (at an extra cost of \$25.4 million);

WHEREAS, the City Council finds that the Capping Alternative advances implementation of the Master Plan in a more cost effective manner than Dredging Alternative;

WHEREAS, the City Council endorses the letters from the Alderman representing the City's 8th Ward (Alderman Larsen) published by the News Sun and submitted by the Alderman to USEPA on November 25, 2008 and December 30, 2008;

WHEREAS, despite repeated requests by the City's representatives, USEPA has declined to extend public comment on the proposed remedial plan beyond the February 4, 2009 deadline previously established; and

WHEREAS, given the importance of this issue to the future of the City, the City Council requests an opportunity to engage in meaningful consultation with the incoming Obama administration concerning the proposed remedial plan for Waukegan Harbor.

NOW THEREFORE BE IT RESOLVED, by the Waukegan City Council that:

1. The City Council endorses the Capping Alternative and rejects the Dredging Alternative.
2. The City Council directs the Mayor to present this Resolution to the City's Congressional Delegation and State Senator Terry Link and requests their assistance in requesting that the Obama administration extend the public comment period and engage in a dialogue with the City concerning the Master Plan and the remedial plan for Waukegan Harbor.
3. In the event that the Obama Administration does not extend the February 4, 2009 deadline for public comment on the remedial plan currently proposed, the City Council directs Ray Vukovich, City staff and Special Environmental Counsel to submit written public comment to USEPA consistent with this Resolution and addressing the subjects itemized in **Attachment 1** to this Resolution.

ADOPTED AND APPROVED by the **CITY OF WAUKEGAN** on this 20th
day of January, 2009.

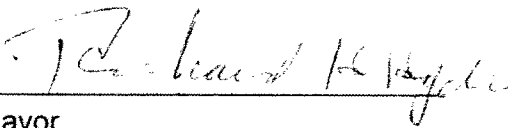
Roll Call: Aldermen Needham, Larsen, Rivera, Cunningham, Koncan, Moisio,
Figueroa, Newsome and TenPas

AYES: Aldermen Needham, Larsen, Rivera, Koncan, Moisio, Figueroa,
Newsome, and TenPas

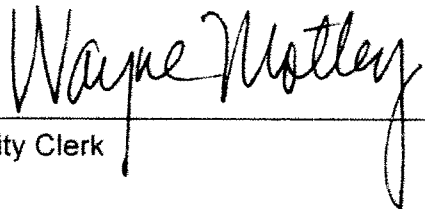
NAYS: Alderman Cunningham

ABSENT: None

ABSTAIN: None



Mayor



City Clerk

ATTACHMENT 1

ATTACHMENT 1

1. CLEANUP PLANT 2 FIRST.

- a) Priority for cleanup should be given to OMC Plant 2 (a/k/a the OMC North Plant).
 - i) USEPA admitted in the remedial plan issued for Plant 2 on September 10, 2007 (p. 13) that as Plant 2 falls into disrepair the PCBs inside the building will migrate into the harbor (via stormwater). It makes no sense to spend \$9.6 million or \$35 million on a remedial plan for the harbor if the harbor will be recontaminated by the PCBs inside Plant 2.

2. THE CITY COUNCIL AND MAYOR SPEAK FOR THE CITY OF WAUKEGAN.

- a) USEPA should exercise caution in making subjective judgments concerning "public acceptance" of its proposed remedial alternative. The City Council and the Mayor are the democratically elected voice of the City.
 - i) It is a particular cause for concern to the City that Floyd Miras, an employee of the Federal Maritime Administration, wrote the May 19, 2008 letter to USEPA submitted on the letterhead of the Waukegan Harbor Citizen Advisory Group (CAG), an organization claiming (although never authorized or selected) to speak for the residents of the City of Waukegan.

3. THE FUTURE USE OF THE HARBOR IS FOR RECREATIONAL BOATING NOT INDUSTRIAL SHIPPING.

- a) In selecting a remedial alternative for the harbor the USEPA is required to investigate the "reasonably anticipated future use" of the harbor and the land surrounding the harbor.
 - i) Why is USEPA spending \$35 million to dredge a harbor that will be used for recreational boating, not industrial shipping?
 - ii) The USEPA failed to consult with appropriate City officials concerning the Master Plan, current and future zoning and other factors relevant to the reasonably anticipated future use of the harbor and land surrounding the harbor. This is a clear violation of USEPA regulations.
 - iii) While failing to consult with the City, the USEPA did engage in extensive consultation with harbor industry concerning the future use of the harbor.

ATTACHMENT 1

4. DECISIONS CONCERNING REDEVELOPMENT OF THE LAKEFRONT SHOULD BE MADE BY THE CITY NOT USEPA.

- a) According to USEPA the extra \$25.4 million that would be spent on the Dredging Alternative is justified because of the "important redevelopment benefits" an industrial harbor will have for the community.
 - i) There is no evidence in the administrative record to support this determination.
 - ii) USEPA has made this determination without any consultation with the City.
 - iii) Had USEPA consulted with the City, it would have learned of the property taxes, sales taxes, jobs and other "important redevelopment benefits" for the City, Waukegan School District, Waukegan Park District and the greater region that would result from redevelopment of the harbor area as contemplated by the Master Plan.
- (1) The USEPA should also have consulted with the Congress for New Urbanism, Metropolitan Planning Council and Chicago Metropolis 2020, all organizations that have issued awards to the City and have recognized the Master Plan as a model for brownfield redevelopment, "smart growth" and urban renewal.

5. THE PRESIDENT HAS PLENARY AUTHORITY TO SELECT A REMEDY THAT CONFLICTS WITH OTHER FEDERAL, STATE AND LOCAL LAWS.

- a) USEPA claims it has "no choice" but to dredge the harbor. USEPA asserts that the President does not have legal authority under the Federal Superfund Statute to place a cap on the bottom of the harbor that would interfere with navigation by deep draft vessels.
 - i) The administrative record does not contain any legal analysis supporting such a narrow interpretation of the President's authority under the Superfund Statute.
 - ii) Such a constrained reading of the President's authority is not supported by the plain language of the Superfund Statute. On the contrary, the President is given broad authority to waive compliance with other federal, state and local laws so long as the selected remedy is protective of human health and the environment. The Superfund Statute states explicitly that the President is not required to obtain a permit to place a remedial cap within a navigable channel.
 - iii) Such a narrow reading of the President's authority reflects a predisposition in favor of the Dredging Alternative.

ATTACHMENT 1

6. THE HARBOR REMEDIATION WILL BE VERY COSTLY TO THE PUBLIC

- a) USEPA has given assurances that the harbor cleanup will be "free". Nothing is free when it comes to the Superfund Statute.
 - i) USEPA has failed to inform the public that a Superfund lien may be imposed on all the land comprising the OMC "Site". This means that a \$35 million lien could be filed against land owned by National Gypsum, Bombardier, Waukegan Port District, EJ&E Railroad, Larsen Marine and the City of Waukegan.
 - ii) Whether the cleanup will cost \$9.6 million or \$35 million has real financial consequences for those parties that own submerged lands in the harbor and other land comprising the OMC Site.
 - iii) Filing of a \$35 million lien by USEPA against submerged lands in the harbor and lands surrounding the harbor could stop redevelopment of the lakefront.

7. THERE ARE POTENTIALLY RESPONSIBLE PARTIES TO PAY FOR THE CLEANUP OF THE OMC SITE.

- a) On November 24, 2008 Judge Matthew Kennelly of the U.S. District Court for the Northern District of Illinois found that National Gypsum, Bombardier, LaFarge and LaFarge Building Materials (LBM) may be liable for the cost of cleaning up the harbor and other portions of the OMC Site. Thus, these companies are potentially liable under the Superfund Statute for the cleanup of the harbor and other portions of the OMC Site.
 - i) This being the case, the Superfund Statute is clear: "The President shall provide for the participation of interested persons, including potentially responsible parties, in the development of the administrative record on which the President will base the selection of remedial actions" (Emphasis Added)
 - ii) USEPA has failed to provide notice to the potentially responsible parties as required by the Superfund Statute. However, as previously noted, USEPA has conferred with harbor industry (but not the City) concerning the future use of the harbor.
- b) The Superfund Statute also requires that, "The President shall make reasonable efforts to identify and notify potentially responsible parties as early as possible before selection of a response action." (Emphasis Added)
 - i) Before USEPA selects the remedial action for the harbor, it is obligated to give notice to National Gypsum, Bombardier, LaFarge and other parties who are potentially responsible for cleanup costs in the harbor and elsewhere at the OMC Site.

ATTACHMENT 1

- ii) USEPA has exhibited no interest in investigating the liability of these parties or taking any action in follow-up to Judge Kennelly's November 24, 2008 decision.
- iii) USEPA has shown no such hesitancy in pursuing the Waukegan School District and City of Waukegan for millions of dollars to clean up other Superfund sites in the City of Waukegan. Why the double standard?

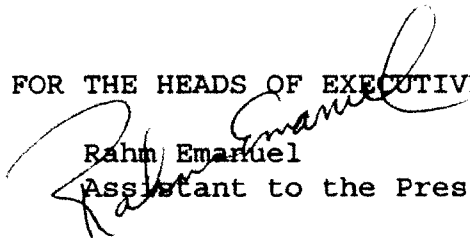
ENCLOSURE 4

THE WHITE HOUSE

WASHINGTON

January 20, 2009

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM:  **Rahm Emanuel**
Assistant to the President and Chief of Staff

SUBJECT: Regulatory Review

President Obama has asked me to communicate to each of you his plan for managing the Federal regulatory process at the beginning of his Administration. It is important that President Obama's appointees and designees have the opportunity to review and approve any new or pending regulations. Therefore, at the direction of the President, I am requesting that you immediately take the following steps:

1. Subject to any exceptions the Director or Acting Director of the Office of Management and Budget (the "OMB Director") allows for emergency situations or other urgent circumstances relating to health, safety, environmental, financial, or national security matters, or otherwise, no proposed or final regulation should be sent to the Office of the Federal Register (the "OFR") for publication unless and until it has been reviewed and approved by a department or agency head appointed or designated by the President after noon on January 20, 2009, or in the case of the Department of Defense, the Secretary of Defense. The department or agency head may delegate this review and approval power to any other person so appointed or designated by the President, consistent with applicable law.
2. Withdraw from the OFR all proposed or final regulations that have not been published in the *Federal Register* so that they can be reviewed and approved by a department or agency head as described in paragraph 1. This withdrawal is subject to the exceptions described in paragraph 1 and must be conducted consistent with OFR procedures.
3. Consider extending for 60 days the effective date of regulations that have been published in the *Federal Register* but not yet taken effect, subject to the

exceptions described in paragraph 1, for the purpose of reviewing questions of law and policy raised by those regulations. Where such an extension is made for this purpose, you should immediately reopen the notice-and-comment period for 30 days to allow interested parties to provide comments about issues of law and policy raised by those rules. Following the 60-day extension:

- a. for those rules that raise no substantial questions of law or policy, no further action needs to be taken; and
 - b. for those rules that raise substantial questions of law or policy, agencies should notify the OMB Director and take appropriate further action.
4. The requested actions set forth in paragraphs 1-3 do not apply to any regulations subject to statutory or judicial deadlines. Please immediately notify the OMB Director of any such regulations.
 5. Notify the OMB Director promptly of any regulations that you believe should not be subject to the directives in paragraphs 1-3 because they affect critical health, safety, environmental, financial, or national security functions of the department or agency, or for some other reason. The OMB Director will review all such notifications and determine whether an exception is appropriate.
 6. Continue in all instances to comply with any applicable Executive Orders concerning regulatory management.

As used in this memorandum, "regulation" has the meaning set forth in section 3(e) of Executive Order 12866 of September 30, 1993, as amended; this memorandum covers "any substantive action by an agency (normally published in the *Federal Register*) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking."

This regulatory review will be implemented by the OMB Director, and communications regarding any matters pertaining to this review should be addressed to that official.

The OMB Director is authorized and directed to publish this memorandum in the *Federal Register*.

ENCLOSURE 5

From: Jeff Jeep
To: Kevin Alder, USEPA Region 5 (adler.kevin@epa.gov);
cc: Mike Joyce, USEPA Region 5 (joyce.mike@epa.gov); Ray Vukovich;
Robert A. Kaplan (kaplan.robert@epa.gov); Fred Gage (gage.fred@epa.gov);
Subject: RE: Waukegan Harbor - Request for Extension of Public Comment Period
Date: Thursday, January 22, 2009 12:54:00 PM
Attachments: [090102 Adler.pdf](#)
[090121 President Obama orders sweeping ethics rules for White House.pdf](#)

Kevin:

We still have not received a reply to our request that the public comment period be extended to at least 3/4/09 (see our 1/2/09 email below and our 1/2/09 letter attached). The City still has not been provided with any documents from USEPA explaining why the Agency did not make a future use determination, the "legal necessity" for the dredging alternative and the basis for "community acceptance" (when another federal agency issued correspondence the USEPA on CAG letterhead). We again refer you to our 1/2/08 letter. We also enclose an article from yesterday's Chicago Tribune, "President Obama orders sweeping ethics rules for White House, freezes senior-level salaries". According the article, "In an attempt to deliver on pledges of a transparent government, Obama said he would change the way the federal government interprets the Freedom of Information Act. He said he was directing agencies that vet requests for information to err on the side of making information public — not to look for reasons to legally withhold it — an alteration to the traditional standard of evaluation." We have highlighted (in yellow) President Obama's comments on this subject in their entirety.

Again, the City is unable to comment on the basis for the preferred remedial alternative because the current administrative record contains NO INFORMATION regarding 1) why the Agency did not make a reasonably foreseeable use determination and 2) the basis for the former administration's determination that there is a "legal necessity" to dredge the harbor. It is fundamentally unfair, and inconsistent with the "new era of openness" to which President Obama referred yesterday, to require the public to comment on a proposed ROD when the administrative record is silent on these critical issues.

Again, please reply to the City's 1/2/09 request that the public comment period be extended until at least 3/4/09.

Regards,

Jeffery Jeep

ENCLOSURE 6



Administrator Lisa Jackson

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Memo to EPA Employees

MEMORANDUM

DATE: January 23, 2009**TO:** All EPA Employees**FROM:** Lisa P. Jackson, Administrator-designate

I can think of no higher calling or privilege than rejoining EPA as your Administrator. I am grateful and humbled that President Obama has given me this honor. With his election and with my appointment, President Obama has dramatically changed the face of American environmentalism. With your help, we can now change the face of the environment as well.

During my 21 years in public service, I have witnessed firsthand the dedication and professionalism of EPA's workforce. Thousands of committed, hard-working and talented employees for whom protecting the environment is a calling, not just a job, have made EPA a driving force in environmental protection since 1970.

EPA can meet the nation's environmental challenges only if our employees are fully engaged partners in our shared mission. That's why I will make respect for the EPA workforce a bedrock principle of my tenure. I will look to you every day for ideas, advice and expertise. EPA should once again be the workplace of choice for veteran public servants and also talented young people beginning careers in environmental protection – just as it was for me when I first joined EPA shortly after graduate school.

In outlining his agenda for the environment, President Obama has articulated three values that he expects EPA to uphold. These values will shape everything I do.

Science must be the backbone for EPA programs. The public health and environmental laws that Congress has enacted depend on rigorous adherence to the best available science. The President believes that when EPA addresses scientific issues, it should rely on the expert judgment of the Agency's career scientists and independent advisors. When scientific judgments are suppressed, misrepresented or distorted by political agendas, Americans can lose faith in their government to provide strong public health and environmental protection.

The laws that Congress has written and directed EPA to implement leave room for policy judgments. However, policy decisions should not be disguised as scientific findings. I pledge that I will not compromise the integrity of EPA's experts in order to advance a preference for a particular regulatory outcome.

EPA must follow the rule of law. The President recognizes that respect for Congressional mandates and judicial decisions is the hallmark of a principled regulatory agency. Under our environmental laws, EPA has room to exercise discretion, and Congress has often looked to EPA to fill in the details of general policies. However, EPA needs to exercise policy discretion in good faith and in keeping with the directives of Congress and the courts. When Congress has been explicit, EPA cannot misinterpret or ignore the language Congress has used. When a court has determined EPA's responsibilities under our governing statutes, EPA cannot turn a blind eye to the court's decision or procrastinate in complying.

EPA's actions must be transparent. In 1983, EPA Administrator Ruckelshaus promised that EPA would operate "in a fishbowl" and "will attempt to communicate with everyone from the environmentalists to those we regulate, and we will do so as openly as possible."

I embrace this philosophy. Public trust in the Agency demands that we reach out to all stakeholders fairly and impartially, that we consider the views and data presented carefully and objectively, and that we fully disclose the information that forms the bases for our decisions. I pledge that we will carry out the work of the Agency in public view so that the door is open to all interested parties and that there is no doubt why we are acting and how we arrived at our decisions.

We must take special pains to connect with those who have been historically underrepresented in EPA decision making, including the disenfranchised in our cities and rural areas, communities of color, native Americans, people disproportionately impacted by pollution, and small businesses, cities and towns working to meet their environmental responsibilities. Like all Americans, they deserve an EPA with an open mind, a big heart and a willingness to listen.

As your Administrator, I will uphold the values of scientific integrity, rule of law and transparency every day. If ever you feel I am not meeting this commitment, I expect you to let me know.

Many vital tasks lie before us in every aspect of EPA's programs. As I develop my agenda, I will be seeking your guidance on the tasks that are most urgent in protecting public health and the environment and on the strategies that EPA can adopt to maximize our effectiveness and the expertise of our talented employees. At the outset, I would like to highlight five priorities that will receive my personal attention:

- Reducing greenhouse gas emissions. The President has pledged to make responding to the threat of climate change a high priority of his administration. He is confident that we can transition to a low-carbon economy while creating jobs and making the investment we need to emerge from the current recession and create a strong foundation for future growth. I share this vision. EPA will stand ready to help Congress craft strong, science-based climate legislation that fulfills the vision of the President. As Congress does its work, we will move ahead to comply with the Supreme Court's decision recognizing EPA's obligation to address climate change under the Clean Air Act.
- Improving air quality. The nation continues to face serious air pollution challenges, with large areas of the country out of



Administrator-designate
Lisa P. Jackson

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attainment with air-quality standards and many communities facing the threat of toxic air pollution. Science shows that people's health is at stake. We will plug the gaps in our regulatory system as science and the law demand.

- Managing chemical risks. More than 30 years after Congress enacted the Toxic Substances Control Act, it is clear that we are not doing an adequate job of assessing and managing the risks of chemicals in consumer products, the workplace and the environment. It is now time to revise and strengthen EPA's chemicals management and risk assessment programs.
- Cleaning up hazardous-waste sites. EPA will strive to accelerate the pace of cleanup at the hundreds of contaminated sites across the country. Turning these blighted properties into productive parcels and reducing threats to human health and the environment means jobs and an investment in our land, our communities and our people.
- Protecting America's water. EPA will intensify our work to restore and protect the quality of the nation's streams, rivers, lakes, bays, oceans and aquifers. The Agency will make robust use of our authority to restore threatened treasures such as the Great Lakes and the Chesapeake Bay, to address our neglected urban rivers, to strengthen drinking-water safety programs, and to reduce pollution from non-point and industrial dischargers.

As we meet these challenges, we must be sensitive to the burdens pollution has placed on vulnerable subpopulations, including children, the elderly, the poor and all others who are at particular risk to threats to health and the environment. We must seek their full partnership in the greater aim of identifying and eliminating the sources of pollution in their neighborhoods, schools and homes.

EPA's strength has always been our ability to adapt to the constantly changing face of environmental protection as our economy and society evolve and science teaches us more about how humans interact with and affect the natural world. Now, more than ever, EPA must be innovative and forward looking because the environmental challenges faced by Americans all across our country are unprecedented.

These challenges are indeed immense in scale and urgency. But, as President Obama said Tuesday, they will be met. I look forward to joining you at work on Monday to begin tackling these challenges together.

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ENCLOSURE 7



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

JAN 23 2009

REPLY TO THE ATTENTION OF
S-6J

Mr. Jeffery D. Jeep
Jeep & Blazer LLC
24 N. Hillside Ave.
Suite A
Hillside, IL 60162

Re: Request for Second Extension of Public Comment Period
Waukegan Harbor (Outboard Marine Corporation) Site

Dear Mr. Jeep:

Thank you for your January 2, 2009, letter to Kevin Adler, of my staff, in which you requested, on behalf of the City of Waukegan, a second extension to the comment period for the Waukegan Harbor proposed plan for Record of Decision (ROD) Amendment. The United States Environmental Protection Agency (EPA) is declining your request for a second extension as explained below.

The National Oil and Hazardous Substances Pollution Contingency Plan (NCP) (*Federal Register* Vol. 55, No. 46) requires EPA to "provide a reasonable opportunity, not less than 30 calendar days, for submission of written and oral comments" on a proposed plan. Further, "upon timely request" the EPA will extend the comment period by a minimum additional 30 days (40 CFR § 300.430(f)(3)(i)(C)). The EPA released the Waukegan Harbor proposed plan for public comment on November 1, 2008, with the comment period initially slated to run from November 3, 2008, until January 5, 2009. The EPA established a 60-day comment period, double the time frame mandated by the NCP, in recognition of the complexity of the site issues and likely interest by many in the community. The EPA held a public meeting in Waukegan on November 13, 2008, to announce and take oral comments on the proposed plan. At this meeting, you verbally requested an extension of the comment period and reiterated this request in a letter to Mr. Adler dated December 3, 2008. Upon consideration of this extension request, EPA extended the comment period an additional 30 days, until February 4, 2009.

We believe that a 90-day comment period is a reasonable period of time for the public, including the City of Waukegan, to make informed comments on the proposed cleanup plan for Waukegan Harbor. City officials and consultants were involved in the recent efforts from 2003 to 2007 to clean up the harbor sediment under the Great Lakes Legacy Act (GLLA). The city was the sponsor of a cleanup plan for the harbor and

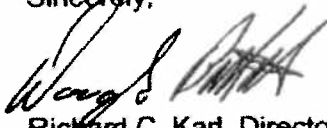
presented the plan to EPA for consideration in February 2007. Through these efforts the city had reasonable opportunity and time to review existing technical information concerning the harbor and clean up alternatives contemplated under the GLLA. The city's proposed GLLA plan is similar to EPA's current proposed plan. The city's plan addressed the same future-use issues for the harbor and provided for the deepening of the harbor's federally-authorized channel in cooperation with harbor industry.

The city has submitted Freedom of Information Act (FOIA) requests to EPA and other agencies concerning Waukegan Harbor. Through those requests EPA has already released the bulk of the responsive documents to the city. The city bases, in part, its second extension request on the presumption that the FOIA request will not be fully responded to until the agreed upon due date of January 25, 2009. All documents in the administrative record for the Waukegan Harbor site have been located at the city's public library since November 2008 and late last week, EPA released these remaining responsive documents under the FOIA request.

Your first extension request letter, dated December 2, 2008, stated that EPA had "deemed it appropriate to consult with the Harbor industry" on the direction of the proposed plan. Informational meetings have been held with local harbor industries, the Waukegan Community Advisory Group (CAG) and the general public for many years. The city has been an active participant throughout the remedial investigation and feasibility study.

Thank you for your interest and input on the proposed remedy. I look forward to receiving the city's formal comments on the proposed plan for cleanup of Waukegan Harbor by February 4, 2009.

Sincerely,


Richard C. Karl, Director
Superfund Division

ENCLOSURE 8

Ray Vukovich

From: Karl.Richard@epamail.epa.gov
Sent: Monday, January 26, 2009 3:49 PM
To: Ray Vukovich
Cc: Adler.Kevin@epamail.epa.gov
Subject: Waukegan Harbor Proposed Plan

Mr. Vukovich:

Kevin Adler has forwarded to me your January 23, 2009, e-mail to him in which you ask that I reconsider my recent decision to not further extend the comment period for the Waukegan Harbor proposed plan. You have based your request on an interpretation of White House Chief of Staff Rahm Emanuel's January 20, 2009, memo, on behalf of President Obama, that concerns regulatory review.

I note that Mr. Emanuel's memo states that "regulation" has the meaning as set forth in Section 3(e) of Executive Order (EO) 12866, issued on September 30, 1993.

Section 3(e) of EO 12866 defines the term "regulatory action" as follows
:

(e) "Regulatory action" means any substantive action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking.

and Section 3(d) of EO 12866 defines "regulation" as follows:

"Regulation" or "rule" means an agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency.

In view of the above, the issuance of the Region's proposed plan, or the issuance of a Record of Decision (ROD), does not constitute the issuance of a rule or regulation of "general applicability and future effect."

Thus, the January 20, 2009, memorandum from the White House does not apply in this case.

Therefore, for the reasons set out in my letter to you of January 23, 2009, I have decided to retain my decision to not further extend the comment period on the Region's proposed plan for the Harbor.

Thank you for your interest in this matter.

Richard C. Karl, Director
Superfund Division